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No. 98-970

In the Supreme Court of the United States

OCTOBER TERM, 1998

WILLEM RIDDER, ET AL., PETITIONERS

v.

OFFICE OF THRIFT SUPERVISION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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12 pp

QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that petitioners' challenge to a temporary cease-and-desist order issued by the Office of Thrift Supervision is barred by 12 U.S.C. 1818(i)(1).

2. Whether dismissal of petitioners' suit pursuant to Section 1818(i)(1) violates petitioners' rights under the Due Process Clause of the Fifth Amendment.

3. Whether this Court's decision in *Leedom* v. *Kyne*, 358 U.S. 184 (1958), provides a basis for the district court to exercise jurisdiction over petitioners' suit.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A14) is reported at 146 F.3d 1035. The opinion of the district court (Pet. App. B1-B9) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 1998. A petition for rehearing was denied on September 17, 1998 (Pet. 2). The petition for a writ of certiorari was filed on December 14, 1998. The petition invokes the jurisdiction of this Court under 28 U.S.C.

1254(a) (see Pet. 2), which we assume to be a reference to 28 U.S.C. 1254(1).[1]

STATEMENT

1. Petitioners are former officers of a second tier subsidiary of CityFed Financial Corporation (CityFed). CityFed is a holding company that was created in 1984 to acquire City Federal Savings Association (City Federal), a federally insured savings association. The Federal Home Loan Bank Board, the predecessor of respondent Office of Thrift Supervision (OTS), approved that acquisition subject to the condition that CityFed maintain City Federal's net worth at the required level and, if necessary, infuse additional equity capital into City Federal. CityFed failed to honor that condition. In 1989, OTS declared City Federal insolvent and appointed the Resolution Trust Corporation (RTC) as receiver. Pet. App. A3-A4.

In 1994, acting pursuant to 12 U.S.C. 1818(b), OTS commenced an administrative enforcement proceeding against CityFed and seven of its current and former officers. OTS charged that CityFed and its officers had permitted City Federal's net worth to fall $118 million short of minimum regulatory capital requirements, and the agency sought restitution in that amount. At the same time, pursuant to 12 U.S.C. 1818(c), OTS issued a temporary cease-and-desist order (Temporary Order) against CityFed to prevent further dissipation of CityFed's assets, which had shrunk considerably after the RTC's appointment as receiver for City Federal. The Temporary Order, which remains in place, bars

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[1] The petition identifies Jonathan L. Fiechter, a former Acting Director of the Office of Thrift Supervision, as a respondent. Ellen S. Seidman, the current Director, is the proper party respondent.

CityFed from transferring funds or assets, except for payment of its own operating expenses, not to exceed $15,000 per month, and its own legal expenses. Petitioners are not parties to the administrative proceeding brought by OTS against CityFed. They are not named in the Temporary Order and were not served with that Order. Pet. App. A4-A5, A10.

2. In 1992, the RTC commenced a separate proceeding against petitioners in the United States District Court for the District of New Jersey, alleging fraud and breach of fiduciary duty. Petitioners sought advancement of their defense costs from CityFed pursuant to a provision of CityFed's bylaws. After CityFed refused payment, petitioners filed an action to compel CityFed to advance the funds. Pet. App. A5.

The district court denied petitioners' motion for a preliminary injunction. *Ridder* v. *CityFed Fin. Corp.*, 853 F. Supp. 131 (D.N.J. 1994). The court of appeals reversed and remanded to the district court. *Ridder* v. *CityFed Fin. Corp.*, 47 F.3d 85 (3d Cir. 1995). In light of the limited record before it, however, the court of appeals specifically declined to address the impact of the Temporary Order. *Id.* at 87-88.

On remand, the district court entered an injunction directing CityFed to advance petitioners' defense costs. CityFed appealed, contending that the injunction conflicted with the Temporary Order. In an unpublished opinion issued in April 1996, the Third Circuit vacated the injunction, finding that the Temporary Order barred CityFed from advancing petitioners' legal fees and expenses, and again remanded the case to the district court. See Pet. App. A6.

3. In the interim, CityFed and its directors brought an action against OTS to enjoin enforcement of the Temporary Order. The district court denied the motion

for a preliminary injunction. *CityFed Fin. Corp.* v. *OTS*, 919 F. Supp. 1 (D.D.C. 1994). The court of appeals affirmed, upholding OTS's authority to issue the Temporary Order and finding that CityFed and its directors had failed to demonstrate irreparable harm. *CityFed Fin. Corp.* v. *OTS*, 58 F.3d 738 (D.C. Cir. 1995); Pet. App. C1-C21. After the D.C. Circuit issued its decision, CityFed sought permission from OTS to pay the costs that petitioners incurred in defending against the RTC action. *Id.* at A6. OTS refused to permit CityFed to make the payment. *Ibid.*

4. Petitioners then filed this action against OTS, alleging that the Temporary Order deprived them of their right to receive advance payment of attorneys' fees from CityFed in violation of various constitutional provisions. The district court dismissed petitioners' complaint, holding that it lacked subject matter jurisdiction to consider their claims. Pet. App. B1-B9.

The district court relied on 12 U.S.C. 1818(i)(1), which provides in relevant part that "except as otherwise provided in this section * * * no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under [this] section, or to review, modify, suspend, terminate, or set aside any such notice or order." Petitioners contended that their suit was authorized by 12 U.S.C. 1818(c)(2), which states that "[w]ithin ten days after the depository institution concerned or any institution-affiliated party has been served with a temporary cease-and-desist order, the depository institution or such party may apply to the United States district court * * * for an injunction." The district court found that provision to be inapplicable to petitioners' suit, explaining that petitioners "are not the 'depository institution concerned' or an 'institution-affiliated party'

who has been served with a Notice of Charges or a cease and desist order." Pet. App. B7. The court acknowledged that petitioners "have been harmed by the effect of the Temporary Order and the OTS administrative proceeding," but it concluded that "this injury does not confer jurisdiction on the Court to enjoin the effect of that Order." *Id.* at B8.

5. The court of appeals affirmed. Pet. App. A1-A14. The court first held that Section 1818(c)(2) was inapplicable to petitioners' suit and that the suit was therefore barred by Section 1818(i)(1). *Id.* at A8-A11. The court explained that "[b]ecause [petitioners] were not served with (or named in) the Notice of Charges or the Temporary Order, they * * * are statutorily ineligible to file suit under" Section 1818(c)(2). *Id.* at A10.

The court of appeals also rejected petitioners' alternative argument that the district court should have exercised jurisdiction pursuant to *Leedom* v. *Kyne*, 358 U.S. 184 (1958), and its progeny. Pet. App. A11-A12. The court relied on *Board of Governors* v. *MCorp Financial, Inc.*, 502 U.S. 32 (1991), in which this Court held that 12 U.S.C. 1818(i), unlike the statutory scheme at issue in *Kyne*, "provides * * * clear and convincing evidence that Congress intended to deny the District Court jurisdiction to review and enjoin the [banking agencies'] ongoing administrative proceedings." *MCorp*, 502 U.S. at 44 (quoted at Pet. App. A12).

The court of appeals also held that petitioners had failed to make a clear and convincing showing that the Temporary Order violated their constitutional rights. Pet. App. A12-A14. The court observed that "the Fifth Amendment's Due Process Clause 'does not apply to the indirect adverse effects of government action.'" *Id.* at A13 (quoting *O'Bannon* v. *Town Court Nursing Ctr.*,

447 U.S. 773, 789 (1980)). The court explained that petitioners

> were not named in the Temporary Order, nor did the Temporary Order serve to restrict [petitioners'] use of their own assets. Accordingly, any harm the [petitioners] have suffered from the issuance of the Temporary Order was a consequential result of a lawful action OTS directed towards [CityFed], and therefore was no due process violation.

Ibid. The court noted as well that CityFed, "the directly regulated party, * * * had a strong interest in challenging the Temporary Order, as evidenced by its separate lawsuit challenging the order." *Id.* at A14.[2]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. Petitioners contend (Pet. 23-26) that, because they are employees of City Federal, a "depository institution," they are "institution-affiliated part[ies]" authorized to bring suit under 12 U.S.C. 1818(c)(2). That argument is without merit. Section 1818(c)(2) provides that "[w]ithin ten days after the depository institution concerned or any institution-affiliated party has been served with a temporary cease-and-desist order, the depository institution or such party may apply to the United States district court * * * for an

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[2] After the District of Columbia Circuit issued its decision in this case, petitioners settled the action brought against them by the RTC. See Pet. 8. We are informed by OTS that the enforcement proceeding against CityFed remains pending before an administrative law judge.

injunction." Even assuming that petitioners could be characterized as "institution-affiliated" persons, they have not been served with the Temporary Order and are not *parties* to the administrative proceeding. See Pet. App. A10. They are consequently not entitled to seek judicial review of the Temporary Order pursuant to Section 1818(c)(2).

2. Contrary to petitioners' suggestion (Pet. 8-15), this case does not present any question concerning congressional power to foreclose all judicial review of OTS actions. Section 1818(c)(2) provides for review of temporary cease-and-desist orders—including the Temporary Order at issue in this case—in an action brought by the "depository institution concerned" or by "institution-affiliated part[ies]" that have been served with the temporary order to cease and desist. Indeed, CityFed and its directors invoked that provision in their unsuccessful challenge to the Temporary Order. See pp. 3-4, *supra*. In addition, should OTS issue a final order against CityFed in the underlying administrative proceeding, CityFed will have the right to challenge that order in an action brought in the court of appeals pursuant to 12 U.S.C. 1818(h)(2).

Thus, both the Temporary Order and any final order entered by OTS will be subject to judicial review. The fact that petitioners are not among the parties authorized to seek review of those orders is neither anomalous, cf. *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 349-352 (1984), nor unconstitutional. This Court has repeatedly held that "the due process provision of the Fifth Amendment does not apply to the indirect adverse effects of governmental action." *O'Bannon* v. *Town Court Nursing Ctr.*, 447 U.S. 773, 789 (1980). The Due Process Clause "has always been understood as referring only to a direct appropriation, and not to

consequential injuries resulting from the exercise of lawful power." *Ibid.* (quoting *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 551 (1870)).

As the court of appeals recognized (see Pet. App. A13), any harm that petitioners may have suffered from the Temporary Order is simply an indirect and consequential result of the OTS's lawful exercise of enforcement authority against CityFed. The Temporary Order was issued against CityFed, not petitioners. It restrains CityFed's use of its assets and does not restrict in any way petitioners' use of their own funds. CityFed —the party directly affected by the Temporary Order —has a strong incentive to contest the government's enforcement action and, indeed, has pursued such a challenge. *Id.* at A13-A14; compare *O'Bannon*, 447 U.S. at 790 n.22. Although petitioners were undoubtedly affected by the Temporary Order, they have no constitutional right to a hearing on the propriety of that administrative action.[3]

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[3] Petitioners' reliance (Pet. 20-23) on *Coit Independence Joint Venture* v. *FSLIC*, 489 U.S. 561 (1989), is misplaced. The Court in *Coit* held that a claimant was not required to comply with an administrative exhaustion requirement imposed by agency regulation where delays in the administrative process rendered that remedial scheme inadequate. *Id.* at 586-587. Nothing in *Coit* suggests that delays in an administrative enforcement process can serve as a basis for a federal court to adjudicate claims falling outside its statutory jurisdiction.

Petitioners also assert (Pet. 3), without explanation, that the issue raised in their petition is "similar" to the question before the Court in *Reno* v. *American-Arab Anti-Discrimination Committee*, No. 97-1252 (argued Nov. 4, 1998). We disagree. Apart from the fact that both cases present questions concerning the authority of the federal courts to review specific categories of administrative action, there is no meaningful similarity between the two.

3. Petitioners' reliance (Pet. 18-20) on *Leedom* v. *Kyne*, 358 U.S. 184 (1958), is misplaced. As this Court observed in *Board of Governors* v. *MCorp Financial, Inc.*, 502 U.S. 32 (1991), "the clarity of the congressional preclusion of review in" Section 1818(i)(1) distinguishes this case from *Kyne*. 502 U.S. at 44; see Pet. App. A12. In this case, as in *MCorp*, Section 1818(i)(1) "provides * * * clear and convincing evidence that Congress intended to deny the District Court jurisdiction." 502 U.S. at 44.

4. Even if the questions presented otherwise warranted this Court's review, the current posture of the various proceedings involving OTS, the RTC, petitioners, and CityFed would make review inappropriate. As noted above (see note 2, *supra*), petitioners have settled the action that the RTC brought against them. The only claim that petitioners brought in the instant suit is a claim for advancement of costs to facilitate their defense of that action. Now that the RTC action against them has been settled, however, petitioners' claim for advancement of costs is essentially moot, leaving only a potential claim for indemnification.

At this stage of the administrative enforcement proceedings against CityFed, it is unclear whether OTS will issue a final cease-and-desist order against CityFed pursuant to 12 U.S.C. 1818(b)(1). If OTS issues such an order, CityFed will have the opportunity to challenge it pursuant to 12 U.S.C. 1818(h)(2). See p. 7, *supra*. If the charges against CityFed are ultimately dismissed, the Temporary Order will dissolve and no longer bar CityFed from disbursing funds. See 12 U.S.C. 1818(c). It is therefore uncertain what permanent impact, if any, the administrative proceedings against CityFed will ultimately have on petitioners' ability to recoup the costs of their defense.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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